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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NANCY L. BUCHANAN,)	
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Plaintiff,)	
)	No. C 00-04701 BZ
v.)	
)	ORDER GRANTING PLAINTIFF'S
U.S. DEPT. OF HEALTH AND)	MOTION FOR SUMMARY JUDGMENT AND
HUMAN SERVICES, et al.,)	DENYING DEFENDANT'S MOTION TO
)	DISMISS
Defendants.)	
_____)	

After being involved in an automobile collision with Pamela Zaste, the tribal administrator for the Guidiville Indian Rancheria ("Guidiville"), plaintiff Nancy Buchanan sued Ms. Zaste, Guidiville and the United States Department of Health and Human Services ("United States") pursuant to the Federal Tort Claims Act ("FTCA").¹

At the time of the accident, Ms. Zaste was transporting Gregory Zaste, a member of the tribe who also happens to be her son, to a court-ordered drug test using

¹ The parties have consented to the jurisdiction of a United States Magistrate Judge for all proceedings including entry of final judgment pursuant to 28 U.S.C. § 636(c).

1 a government vehicle. Plaintiff alleges that Mr. Zaste's
2 court-ordered drug test was part of a broader treatment
3 plan contemplated by the Self-Determination Agreement
4 ("Agreement") between Guidiville and the United States.
5 Plaintiff argues that because Ms. Zaste was acting within
6 the scope of her employment pursuant to the Agreement,
7 plaintiff is entitled to damages from the United States
8 under the FTCA.

9 The U.S. Attorney General decided not to certify Ms.
10 Zaste as a federal employee acting within the scope of her
11 employment. (Stephens Decl. in Supp. of Pl.'s Mot. for
12 Summ. J., Ex. C.). In challenging the scope of employment
13 certification, plaintiff bears the burden of disproving
14 the Attorney General's decision by a preponderance of the
15 evidence. See Green v. Hall, 8 F.3d 695, 698 (9th Cir.
16 1993). The district court reviews the certification
17 decision *de novo*. See id. Plaintiff now moves for
18 summary judgment on the issue of whether Ms. Zaste was
19 acting within the scope of her employment.

20 Defendant United States has filed a cross motion
21 under Federal Rule of Civil Procedure 12(b)(1) seeking a
22 dismissal for lack of subject matter jurisdiction.²
23 According to defendant, Ms. Zaste was acting outside the
24 scope of her employment as defined by the Agreement with
25

26
27 ² Defendant has also moved to strike the Zaste and
28 Pomilia declarations. After reviewing the declarations,
defendant's motion to strike is **DENIED**.

1 the United States, thereby precluding plaintiff from
2 invoking the FTCA exception to sovereign immunity.

3 The Federal Rules of Civil Procedure provide for
4 summary adjudication when "the pleadings, depositions,
5 answers to interrogatories, and admissions on file,
6 together with the affidavits, if any, show that there is
7 no genuine issue as to any material fact and that the
8 moving party is entitled to a judgment as a matter of
9 law." Fed. R. Civ. P. 56(c). A genuine issue of material
10 fact exists if a reasonable jury could return a verdict in
11 favor of the nonmoving party. See Anderson v. Liberty
12 Lobby, Inc., 477 U.S. 242, 248 (1986). The court does not
13 make credibility determinations or weigh conflicting
14 evidence, and views the evidence in the light most
15 favorable to the nonmoving party. See T.W. Elec. Serv. v.
16 Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-631
17 (9th Cir. 1987) (citing Matsushita Elec. Indus. Co., Ltd.
18 v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)).

19 "When 'ruling on a jurisdictional motion involving
20 factual issues which also go to the merits, the trial
21 court should employ the standard applicable to a motion
22 for summary judgment . . . [T]he moving party should
23 prevail only if the material jurisdictional facts are not
24 in dispute and the moving party is entitled to prevail as
25 a matter of law.'" Trentacosta v. Frontier Pac. Aircraft
26 Indus., Inc., 813 F.2d 1553, 1558 (9th Cir. 1987) (quoting
27 Augustine v. U.S., 704 F.2d 1074, 1077 (9th Cir. 1983)).
28 Here, the court will have subject matter jurisdiction

1 under the FTCA only if Ms. Zaste was acting within the
2 scope of her employment under the Agreement. Thus, the
3 facts relevant to determining subject matter jurisdiction
4 directly implicate the facts necessary to a finding of
5 liability against the defendant under the FTCA.

6 Whether Ms. Zaste was acting within the course and
7 scope of her employment presents two related questions.
8 The first question this court must decide is whether
9 transporting a member of the Guidiville tribe to a court-
10 ordered drug test is an act which is covered by the
11 Agreement. Put another way, if Mr. Zaste had been driven
12 by someone specifically hired by Guidiville to provide
13 transportation to clients required to undergo drug testing
14 as a condition of probation, would that person have been
15 engaged in conduct covered by the Agreement?

16 The contract between the United States and Guidiville
17 requires Guidiville to provide a broad range of health and
18 human services for its tribal members, including extensive
19 alcohol and drug abuse prevention services. (Stephens
20 Decl. in Supp. of Pl.'s Mot. for Summ. J., Ex. A
21 ("Agreement") at 4-8). Among other services, the
22 Agreement provides for the collection of "pertinent health
23 data from client", the "assessment and planning of
24 treatment for client based on individual client need", and
25 "supportive services, such as assisting the client to
26 obtain social, medical, educational or employment
27 services." (Agreement at 5). The accompanying Scope of
28 Work document also provides for a wide range of counseling

1 services and for "disease prevention, health education,
2 and *monitoring of high risk service users*." (Stephens
3 Decl. in Supp. of Pl.'s Mot. for Summ. J., Ex. B ("Scope
4 of Work") at 1, 3) (emphasis added). Both documents also
5 require the transportation of patients for health related
6 reasons. (Agreement at 12; Scope of Work at 3).

7 While the Agreement does not expressly provide for
8 the transportation of a member to his court-ordered drug
9 test, its section on purpose states that it "shall be
10 liberally construed for the benefit of the Contractor
11 [Guidiville] to transfer the funding and the following
12 related functions, services, activities, and programs. . .
13 including all related administrative functions, from the
14 Federal Government to the Contractor." (Agreement at 2).
15 Assistance in interpreting the Agreement is further
16 provided by the undisputed testimony of the custom and
17 course of dealing between Guidiville and the United States
18 in acting under and interpreting the Agreement. "Where
19 contractual language . . . suggests several speculative
20 interpretations, the scope of the language must be read in
21 accordance with the parties' contemporaneous construction,
22 and . . . the parties' interpretation and performance of
23 the contract may be relevant evidence of the contract
24 itself." United States ex. rel. Oliver v. The Parsons
25 Co., 195 F.3d 457, 459 (9th Cir. 1999), cert. denied, 530
26 U.S. 1228 (2000) (citations omitted). See also Columbia
27 Casualty Co. v. Northwestern Nat'l Ins. Co., 231 Cal. App.
28 3d 457, 470 n.3 (1991) (noting that since the

1 liberalization of California's parole evidence rule, parole
2 evidence of custom and usage is admissible to interpret
3 the meaning of written words). It is especially
4 informative that Guidiville's staff interpreted the
5 Agreement to authorize the transport of clients to court-
6 ordered drug tests if the need ever arose. (Guidiville
7 Dep. at 33; Stephens Decl. in Opp'n to Def.'s Mot. to
8 Dismiss, Ex. 1 at 28-29; Laverdure Decl., Ex. A at 81-82,
9 88-89). Taken together, I conclude that the evidence
10 offered by plaintiff unequivocally demonstrates that the
11 Agreement between Guidiville and the United States
12 includes the ability of the tribe to work together with
13 the judicial system in an effort to monitor Mr. Zaste's
14 rehabilitation.³

15 The second question this court must decide is whether
16 Ms. Zaste could have provided such transportation to Mr.
17 Zaste within the course and scope of her employment as
18 tribal administrator. The language of the FTCA is
19 unambiguous, waiving the government's sovereign immunity
20 by covering injuries "caused by the negligent or wrongful
21 act or omission of any employee of the Government while
22 acting within the scope of his office or employment . . ."
23 28 U.S.C. § 1346(b). Although ordinarily waivers of

25 ³ It is immaterial that language in a former agreement on
26 providing that Guidiville's outreach services include jail and
27 court visits was deleted in the current version of the
28 Agreement. Jail and court visits are quite different from a
court-ordered drug test designed to monitor a tribe member's
health and welfare. The Agreement was created for this latter
purpose.

1 sovereign immunity are strictly construed in favor of the
2 government, the FTCA has been characterized as a broad
3 waiver of sovereign immunity. See Berkovitz v. U.S., 486
4 U.S. 531, 535 (1988); Reed v. U.S. Dep't of the Interior,
5 231 F.3d 501, 504 (2000). The determination of the scope
6 of employment for purposes of United States liability is
7 governed by respondeat superior principles of the state in
8 which the alleged tort was committed. See McLachlan v.
9 Bell, 261 F.3d 908, 911 (9th Cir. 2001) (citing Gutierrez
10 de Martinez v. Lamagno, 515 U.S. 417, 420 (1995)). The
11 conduct at issue occurred in Ukiah, California, so
12 California law controls the scope of employment issue.

13 California interprets the scope of employment issue
14 broadly under its respondeat superior doctrine. See
15 Farmers Ins. Group v. County of Santa Clara, 11 Cal.4th
16 992, 1003-04 (1995). An employee's conduct is foreseeable
17 and therefore within the scope of employment if it "is not
18 so unusual or startling that it would seem unfair to
19 include the loss resulting from it among other costs of
20 the employer's business." Id. Furthermore,

21 "Where the employee is combining his own business
22 with that of his employer, or attending to both at
23 substantially the same time, no nice inquiry will
24 be made as to which business he was actually
25 engaged in at the time of injury, *unless it*
clearly appears that neither directly nor
indirectly could he have been serving his
employer."

26 Id. (quoting John R. v. Oakland Unified School Dist., 48
27 Cal.3d 438, 447 (1989)) (emphasis added). See also Perez
28 v. Van Groningen & Sons, Inc., 41 Cal.3d 962, 970

1 (1986) (quoting Lockheed Aircraft Corp. v. Indus. Accident
2 Comm'n, 28 Cal.2d 756, 758-759 (1946)).

3 Defendant argues that neither Mr. Zaste's treatment
4 plan nor Ms. Zaste's job duties permit plaintiff to
5 characterize Ms. Zaste's transport of her son to a court-
6 ordered drug test as falling within the scope of her
7 employment. Defendant offers little evidence to support
8 its contention that Mr. Zaste's treatment plan with
9 Guidiville did not include the court-ordered drug test.
10 Conversely, plaintiff provides a wealth of uncontradicted
11 testimony from the tribal chairwoman, the tribal
12 administrator, the tribal health coordinator and Mr.
13 Zaste's probation officer, in addition to Mr. Zaste's
14 counseling records, all of which assert that Mr. Zaste's
15 treatment plan with the tribe included court-ordered drug
16 monitoring. (Stephens Decl. in Supp. of Pl.'s Mot. for
17 Summ. J., Ex. E ("Guidiville Dep.") at 32-33; Zaste Decl.
18 at 2; Laverdure Decl., Ex. A at 82; Pomilia Decl. at 2;
19 Zaste Health Records (under seal) at 34, 39, 41).

20 Defendant also fails to raise a genuine issue as to
21 Ms. Zaste's duties as tribal administrator. The failure
22 of Ms. Zaste's job description to specifically mention
23 driving duties is not enough to overcome the otherwise
24 broad description of her administrative duties, as well as
25 her own testimony and the testimony of the tribal
26 chairwoman. (Ftilis Decl., Ex. F; Stephens Decl. in
27 Supp. of Pl.'s Mot. for Summ. J., Ex. F ("Zaste Dep.") at
28 10-12, 17, 30; Zaste Decl. at 1-2; Guidiville Dep. at 21-

1 22, 25; Laverdure Decl., Ex. A at 53-54). The fact that
2 the tribe had roughly eleven employees at the time of the
3 incident further bolsters the flexible nature of Ms.
4 Zaste's duties.

5 Defendant responds that even if Ms. Zaste's duties
6 included driving Mr. Zaste to his drug test, that duty
7 only arose when "all other" staff were unavailable. As
8 proof, defendant offers the deposition testimony of Ms.
9 Zaste and Guidiville's chairwoman. While Chairwoman
10 Sanchez did testify that she agreed with a written
11 statement by Council Member Verdugo that Ms. Zaste's
12 transportation duties arose "when all other staff is
13 unavailable," (Guidiville Dep. at 53), it is clear from
14 her subsequent testimony that the staff she had in mind
15 were the three members of the health department.
16 (Guidiville Dep. at 54-56). Ms. Zaste likewise testified
17 that she agreed with Ms. Verdugo's statement; she does not
18 appear to have been asked whether she had the entire tribe
19 in mind or just the health department. This evidence does
20 not rise to the level sufficient to establish a genuine
21 issue of material fact. A reasonable jury would find that
22 "all other staff" in the context of the tribe's treatment
23 plans refers to the three staff members in the health
24 department, all of whom were unavailable the morning of
25 the accident. (Guidiville Dep. at 54, 97-98; Zaste Decl.
26 at 2).

27 Considering the broad purpose of the Agreement, Ms.
28 Zaste's decision to transport her son to his drug test

1 falls squarely within the scope of her employment under
2 permissive California law. It is entirely foreseeable
3 that the tribal administrator would be required to drive a
4 tribe member to his court-ordered drug test as part of a
5 treatment plan under the Agreement. Indeed, the
6 undisputed testimony and evidence show that Ms. Zaste's
7 actions were expected. Although an aspect of Ms. Zaste's
8 decision may have been personal because her son was
9 involved, it cannot be said as a matter of law that her
10 actions did not directly or indirectly serve her employer.
11 See John R., 48 Cal.3d at 447. On the contrary, the
12 evidence indicates that she would have ignored her
13 employer's treatment guidelines had she chosen not to
14 transport Mr. Zaste to his appointment. The tribe is
15 entitled to make decisions about its clients'
16 participation in various aspects of their treatment plans.
17 If one such decision allows for the tribal administrator
18 to transport a client to a court-ordered drug test in
19 conjunction with the client's treatment program, the fact
20 that the administrator is also the client's mother should
21 not hinder the broad discretion properly delegated to
22 Guidiville under the Agreement with the United States.

23 If the sole issue to be decided was whether the
24 United States had waived its sovereign immunity in
25 general, defendant would have a stronger argument for
26 dismissing the complaint. The facts in the case at bar,
27 however, present an entirely different picture. Not only
28 has the United States consented to a broad waiver of

1 immunity under the FTCA, but the applicable California
2 respondeat superior law is permissive in finding an
3 employer vicariously liable for its employees' actions.
4 Plaintiff has satisfied her burden by proving by a
5 preponderance of the evidence that both the Agreement and
6 Ms. Zaste's duties as tribal administrator include the
7 transportation of a client to a court-ordered drug test.
8 Accordingly, I find that Ms. Zaste was acting within the
9 scope of her employment when she drove Mr. Zaste to his
10 scheduled drug test. **IT IS HEREBY ORDERED** that
11 plaintiff's motion for summary judgment is **GRANTED** and
12 defendant's cross-motion to dismiss is **DENIED**.

13 Dated: January 18, 2002

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Bernard Zimmerman
United States Magistrate Judge

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